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2
3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 * * *

6 DONOVAN HAYES,

Case No. 3:20-cv-00686-MMD-WGC

7 v.

Plaintiff,

SCREENING ORDER

8 JAMES DZURENDA, et al.,

9 Defendants.

10
11 Plaintiff Donovan Hayes, who is in the custody of the Nevada Department of
12 Corrections (“NDOC”), has submitted a First Amended civil rights complaint (“FAC”)
13 pursuant to 42 U.S.C. § 1983, and has filed an application to proceed *in forma pauperis*
14 (“IFP Application”). (ECF Nos. 1, 5.) The matter of the filing fee will be temporarily
15 deferred. The Court now screens Hayes’ FAC under 28 U.S.C. § 1915A.

16 **I. SCREENING STANDARD**

17 Federal courts must conduct a preliminary screening in any case in which an
18 incarcerated person seeks redress from a governmental entity or officer or employee of
19 a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify
20 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
21 claim upon which relief may be granted, or seek monetary relief from a defendant who is
22 immune from such relief. See *id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must
23 be liberally construed. See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
24 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
25 elements: (1) the violation of a right secured by the Constitution or laws of the United
26 States; and (2) that the alleged violation was committed by a person acting under color
27 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

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In addition to the screening requirements under § 1915A, under the Prison Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the Court takes as true all allegations of material fact stated in the complaint, and the Court construes them in the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels and conclusions. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. See *id.*

Additionally, a reviewing court should “begin by identifying pleadings [allegations] that, because they are no more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide

1 the framework of a complaint, they must be supported with factual allegations.” *Id.* “When
 2 there are well-pleaded factual allegations, a court should assume their veracity and then
 3 determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining
 4 whether a complaint states a plausible claim for relief . . . [is] a context-specific task that
 5 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

6 Finally, all or part of a complaint filed by an incarcerated person may be dismissed
 7 *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This
 8 includes claims based on legal conclusions that are untenable (e.g., claims against
 9 defendants who are immune from suit or claims of infringement of a legal interest which
 10 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
 11 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
 12 *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

13 **II. SCREENING OF FIRST AMENDED COMPLAINT**

14 In his FAC, Hayes sues multiple Defendants for an incident that took place while
 15 Hayes was incarcerated at Southern Desert Correctional Center (SDCC). (ECF No. 5 at
 16 1.) Hayes sues Defendants James Dzurenda (the director of NDOC), Jerry Howell
 17 (warden of SDCC), Frank Dreesen (an associate warden at SDCC), G. Piccinini (an
 18 associate warden at SDCC), and Harris (a correctional officer at SDCC). (*Id.* at 2-3.)
 19 Hayes brings two claims and seeks injunctive and monetary relief. (*Id.* at 5-9, 26.)

20 Hayes alleges the following. On March 25, 2018, Hayes suffered a seizure while
 21 waiting for dental treatment at SDCC’s medical department. (*Id.* at 5.) He recalled trying
 22 to alert Harris. (*Id.*) While suffering from a grand mal seizure, Harris placed Hayes in
 23 handcuffs. (*Id.* at 6.) Hayes’ arm and shoulder were fractured. (*Id.*) Hayes suffered three
 24 more seizures while hand cuffed. (*Id.*) He then woke up at Centennial Hills Hospital,
 25 having already had surgery on his arm and shoulder. (*Id.*) Hayes learned of the above
 26 events from Correctional Officer Sanchez. (*Id.*)

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1 On March 30, 2018, Hayes was transferred to another hospital for rehabilitation.
 2 (*Id.*) Hayes was discharged without being able to perform ADLS and transferred to the
 3 High Desert State Prison (HDSP) infirmary. (*Id.* at 6-7.)

4 On May 4, 2018, Hayes was x-rayed and examined by a specialist. (*Id.* at 7.)
 5 Hayes had a surgery on May 11, which included the installation of metal plates and
 6 screws into the shoulder. (*Id.*)

7 On July 25, 2018, Hayes submitted an informal grievance seeking monetary
 8 compensation for the injury to his shoulder resulting from Harris' use of force in restraining
 9 him. (*Id.* at 8, 10-12.) Piccinini responded to this informal grievance. (*Id.* at 8.) Hayes filed
 10 a first level grievance to appeal the denial of the informal grievance. (*Id.*) When he did not
 11 receive a timely response, Hayes filed his second level grievance. (*Id.* at 8-9.) Defendants
 12 Piccinini, Howell, and Dreesen handle the majority of grievances at SDCC. (*Id.* at 9.)
 13 Dzurenda is responsible for daily operations. (*Id.*)

14 Based on these allegations, Hayes alleges that Defendant Harris used excessive
 15 force against him in violation of the Eighth Amendment and that he was denied an
 16 opportunity to exhaust his administrative grievance process, in violation of the Fourteenth
 17 Amendment. The Court will address each of these claims in turn.

18 **A. Eighth Amendment – Excessive Force**

19 When a prison official stands accused of using excessive physical force in violation
 20 of the cruel and unusual punishment clause of the Eighth Amendment, the question turns
 21 on whether force was applied in a good-faith effort to maintain or restore discipline, or
 22 maliciously and sadistically for the purpose of causing harm. See *Hudson v. McMillian*,
 23 503 U.S. 1, 6-7 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). In
 24 determining whether the use of force was wanton and unnecessary, it may also be proper
 25 to consider factors such as the need for application of force, the relationship between that
 26 need and the amount of force used, the threat reasonably perceived by the responsible
 27 officials, and any efforts made to temper the severity of a forceful response. See *Hudson*,
 28 503 U.S. at 7. Although an inmate need not have suffered serious injury to bring an

1 excessive force claim against a prison official, the Eighth Amendment's prohibition on
 2 cruel and unusual punishments necessarily excludes from constitutional recognition *de*
 3 *minimis* uses of physical force. *Id.* at 9-10.

4 Hayes has sufficiently alleged a cognizable claim that Harris used excessive force
 5 in violation of the Eighth Amendment. Hayes has adequately alleged that Harris used
 6 force against him while restraining him during his seizure. (ECF No. 5 at 6.) He has also
 7 sufficiently alleged that the force was more than *de minimis*, given his allegation that his
 8 arm and shoulder were fractured. (*Id.*) Hayes has further alleged that Harris used
 9 handcuffs to restrain Hayes while Hayes was suffering from a grand mal seizure. (*Id.*) The
 10 Court will permit this claim to proceed.

11 **B. Fourteenth Amendment – Denial of Access to Grievance Procedures**

12 Prisoners have a constitutional right of access to the courts. See *Lewis v. Casey*,
 13 518 U.S. 343, 346 (1996). To establish a violation of the right of access to the courts, a
 14 prisoner must establish that he or she has suffered "actual injury." *Id.* at 349. The actual-
 15 injury requirement mandates that an inmate "demonstrate that a nonfrivolous legal claim
 16 had been frustrated or was being impeded." *Id.* at 353. "The right of meaningful access
 17 to the courts extends to established prison grievance procedures." *Bradley v. Hall*, 64
 18 F.3d 1276, 1279 (9th Cir. 1995), *overruled on other grounds by Shaw v. Murphy*, 532 U.S.
 19 223, 230 n.2 (2001). "[T]he object of the denial-of-access suit, and the justification for
 20 recognizing that claim, is to place the plaintiff in a position to pursue a separate claim for
 21 relief once the frustrating condition has been removed." *Christopher v. Harbury*, 536 U.S.
 22 403, 413 (2002).

23 Hayes has not stated a cognizable claim for denial of access to prison grievance
 24 procedures in violation of the Fourteenth Amendment. The claim is deficient because
 25 Hayes has not alleged an actual injury. Rather, Hayes' allegations detail his efforts to
 26 exhaust the prison grievance process regarding the substantive claims he has brought in
 27 this matter. (ECF No. 5 at 8-9.) The claim is also deficient because Hayes has not
 28 identified any impediment in the grievance process that still needs to be removed. As the

1 Court has previously notified Hayes of the deficiencies of this claim, the Court will dismiss
2 the claim without prejudice but without leave to amend.

3 **III. CONCLUSION**

4 It is therefore ordered that Hayes' application to proceed *in forma pauperis* (ECF
5 No. 1) is deferred.

6 It is further ordered that the First Amended Complaint (ECF No. 5) is the operative
7 complaint. The Clerk of Court is directed to send a courtesy copy of the First Amended
8 Complaint to Hayes.

9 It is further ordered that Count 1 (Eighth Amendment – Excessive Force) may
10 proceed against Defendant Harris.

11 It is further ordered that Count 2 (Denial of Access to Prison Grievance Process)
12 is dismissed without prejudice and without leave to amend.

13 It is further ordered that Defendants James Dzurenda, Jerry Howell, Frank
14 Dreesen, and G. Piccinini are dismissed from the First Amended Complaint without
15 prejudice.

16 It is further ordered that, given the nature of the claim that the Court has permitted
17 to proceed, this action is stayed for 90 days to allow Hayes and Defendant an opportunity
18 to settle their dispute before the \$350.00 filing fee is paid, an answer is filed, or the
19 discovery process begins. During this 90-day stay period and until the Court lifts the stay,
20 no other pleadings or papers may be filed in this case, and the parties may not engage in
21 any discovery, nor are the parties required to respond to any paper filed in violation of the
22 stay unless specifically ordered by the Court to do so. The Court will refer this case to the
23 Court's Inmate Early Mediation Program, and the Court will enter a subsequent order.
24 Regardless, on or before 90 days from the date this order is entered, the Office of the
25 Attorney General must file the report form attached to this order regarding the results of
26 the 90-day stay, even if a stipulation for dismissal is entered prior to the end of the 90-
27 day stay. If the parties proceed with this action, the Court will then issue an order setting
28 a date for Defendants to file an answer or other response. Following the filing of an

1 answer, the Court will issue a scheduling order setting discovery and dispositive motion
2 deadlines.

3 It is further ordered that “settlement” may or may not include payment of money
4 damages. It also may or may not include an agreement to resolve Hayes’ issues
5 differently. A compromise agreement is one in which neither party is completely satisfied
6 with the result, but both have given something up and both have obtained something in
7 return.

8 It is further ordered that if the case does not settle, Hayes will be required to pay
9 the full \$350.00 filing fee. This fee cannot be waived, and the fee cannot be refunded
10 once the Court enters an order granting Hayes’ application to proceed *in forma pauperis*.
11 If the Court allows Hayes to proceed *in forma pauperis*, the fee will be paid in installments
12 from his prison trust account. See 28 U.S.C. § 1915(b). If the Court does not allow Hayes
13 to proceed *in forma pauperis*, the full \$402 filing fee for a civil action (i.e., the \$350 filing
14 fee and the \$52 administrative fee) will be due immediately.

15 It is further ordered that if any party seeks to have this case excluded from the
16 inmate mediation program, that party must file a “motion to exclude case from mediation”
17 no later than 21 days prior to the date set for mediation. The responding party will have
18 seven days to file a response. No reply may be filed. Thereafter, the Court will issue an
19 order, set the matter for hearing, or both.

20 The Clerk of Court is directed to electronically serve a copy of this order, and a
21 copy of Hayes’ First Amended Complaint (ECF No. 5), on the Office of the Attorney
22 General of the State of Nevada, by adding the Attorney General of the State of Nevada
23 to the docket sheet. This does not indicate acceptance of service.

24 It is further ordered that the Attorney General’s Office must advise the Court within
25 21 days of the date of the entry of this order whether it will enter a limited notice of
26 appearance on behalf of Defendants for the purpose of settlement. No defenses or
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1 objections, including lack of service, will be waived as a result of the filing of the limited
2 notice of appearance.

3 DATED THIS 2nd Day of December 2021.

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6 MIRANDA M. DU
7 CHIEF UNITED STATES DISTRICT JUDGE
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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

DONOVAN HAYES

Plaintiff,

v.

JAMES DZUREND**A**, *et al.*,

Defendants.

**NOTE: ONLY THE OFFICE OF THE ATTORNEY GENERAL WILL FILE THIS FORM.
THE INMATE PLAINTIFF MAY NOT FILE THIS FORM.**

On _____ [*the date of the issuance of the screening order*], the Court issued its screening order stating that it had conducted its screening pursuant to 28 U.S.C. § 1915A, and that certain specified claims in this case would proceed. The Court ordered the Office of the Attorney General of the State of Nevada to file a report 90 days after the date of the entry of the Court's screening order to indicate the status of the case at the end of the 90-day stay. By filing this form, the Office of the Attorney General hereby complies.

REPORT FORM

[Identify which of the following two situations (identified in bold type) describes the case, and follow the instructions corresponding to the proper statement.]

Situation One: Mediated Case: The case was assigned to mediation by a court-appointed mediator during the 90-day stay. [If this statement is accurate, check **ONE** of the six statements below and fill in any additional information as required, then proceed to the signature block.]

A mediation session with a court-appointed mediator was held on _____ [enter date], and as of this date, the parties have reached a settlement (even if paperwork to memorialize the settlement remains to be completed). (If this box is checked, the parties are on notice that they must SEPARATELY file either a contemporaneous stipulation of dismissal or a motion

requesting that the Court continue the stay in the case until a specified date upon which they will file a stipulation of dismissal.)

A mediation session with a court-appointed mediator was held on _____ [enter date], and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

No mediation session with a court-appointed mediator was held during the 90-day stay, but the parties have nevertheless settled the case. (*If this box is checked, the parties are on notice that they must SEPARATELY file a contemporaneous stipulation of dismissal or a motion requesting that the Court continue the stay in this case until a specified date upon which they will file a stipulation of dismissal.*)

No mediation session with a court-appointed mediator was held during the 90-day stay, but one is currently scheduled for [enter date].

No mediation session with a court-appointed mediator was held during the 90-day stay, and as of this date, no date certain has been scheduled for such a session.

None of the above five statements describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

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Situation Two: Informal Settlement Discussions Case: The case was NOT assigned to mediation with a court-appointed mediator during the 90-day stay; rather, the parties were encouraged to engage in informal settlement negotiations. [If this statement is accurate, check ONE of the four statements below and fill in any additional information as required, then proceed to the signature block.]

The parties engaged in settlement discussions and as of this date, the parties have reached a settlement (*even if the paperwork to memorialize the settlement remains to be completed*). (*If this box is checked, the parties are on notice that they must SEPARATELY file either a contemporaneous stipulation of dismissal or a motion requesting that the Court continue the stay in this case until a specified date upon which they will file a stipulation of dismissal.*)

The parties engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

The parties have not engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

None of the above three statements fully describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

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1 Submitted this _____ day of _____, _____ by:

2 Attorney Name: _____

3 Print

Signature

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